Nos. 89-1391 and 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent,

THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS AND THE NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JAMES F. FITZPATRICK
Counsel of Record
L. HOPE O'KEEFFE
LAURENCE J. FREEDMAN

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

WALTER DELLINGER
DUKE LAW SCHOOL

Attorneys for Amici Curiae

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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With the consent of the parties, the National Association of Women Lawyers and the National Conference of Women's Bar Associations respectfully submit this brief as *amici curiae* in support of Petitioners.

INTEREST OF AMICI CURIAE

The National Association of Women Lawyers ("NAWL"), founded in 1890, is a voluntary national membership organization of the legal profession. Its

members include attorneys from every state and the District of Columbia, including prosecutors, public defenders, private attorneys, trial and appellate judges from the state and federal courts, legislators, law professors, and law students. NAWL has official representation in various national and international organizations and is an affiliate of the American Bar Association. As an organization made up primarily of women, NAWL has and continues to be a supporter of women's rights. As an organization of attorneys, NAWL supports the integrity of the justice system.

The National Conference of Women's Bar Associations ("NCWBA") is a nonprofit professional organization of state, regional, and local women's bar associations and includes associations in 37 states and the District of Columbia. The NCWBA was formed in 1981 to promote the highest standards of the legal profession, to advance justice, to promote and protect the interests of women, and to pursue these goals through appropriate legal, social, and political action.

The interest of the NAWL and the NCWBA in filing this brief as *amici curiae* is, above all, the preservation of First Amendment speech rights. By manipulating speech of Title X organizations to dictate what the government declares shall be orthodox, the regulations at issue in this case flagrantly contravene the spirit and letter of the First Amendment. As members of the legal profession, we have a special interest in protecting individual rights and liberties guaranteed by the First Amendment from the shifting tides of the political process.

The Title X restrictions upon free speech occur in a context that heightens the NAWL's and NCWBA's concerns. We are committed to protecting zealously the relationship of trust, consistent with professional obligations, between the learned professional and the client, who relies upon the professional's knowledge, expertise, and candor; these regulations threaten the integrity of this professional-client relationship. These concerns are amplified

by the disproportionate harm that the speech restrictions would cause to those persons who lack the funds to pay for private care; it is imperative that professionals providing direct professional services to indigent clients maintain their independence from political intervention.

SUMMARY OF ARGUMENT

The argument of *amici* supports the decision of the First Circuit sitting *en banc* in *Massachusetts* v. *Secretary of HHS* that the Title X regulations violate petitioners' First Amendment free speech rights. *Amici* argue that the Second Circuit concluded erroneously that these regulations are constitutionally sound.

Part I demonstrates that the Title X regulations challenged here are premised upon viewpoint and subject-matter discrimination in violation of the First Amendment. The regulations designedly distort physician-patient communications by dictating what must be said and what may not be said to a pregnant woman who turns to a partially Title X-funded facility for medical advice, regardless of her needs or interests and regardless of the physician's professional obligations. Moreover, they stifle the voice of one side of vital public debate on the abortion issue, directly gagging public support of access to abortion while leaving contrary, anti-abortion speech unfettered.

Part II refutes any contention that the regulations are a mere refusal to subsidize constitutionally protected speech rather than an unconstitutional condition. Part IIA shows that the regulations condition the right to receive Title X funds on an invidiously discriminatory, viewpoint-based requirement that every organization accepting such funds relinquish its right to core protected expression. Under controlling law, such a discriminatory condition could not stand even if it affected only federally funded activities.

Part IIB demonstrates that this unconstitutional condition extends far beyond the imposition of government-

endorsed medical doctrines on federally financed activities. The entire Title X project is required to adhere to the state-dictated position, no matter how small a proportion of the facility's funding derives from the government. Further, onerous requirements of separation between the Title X facility and any entity expressing the disfavored viewpoint deliberately block the participating organization's ability to use private channels to express its views. Such impositions upon independently funded protected speech are blatantly unconstitutional, and thus must be struck down.

ARGUMENT

I. THE TITLE X REGULATIONS VIOLATE FIRST AMENDMENT FREEDOM OF SPEECH RIGHTS BY REGULATING SPEECH ON THE BASIS OF VIEWPOINT, PROHIBITING SPEECH BASED ON ITS SUBJECT MATTER, AND INTERFERING WITH DOCTOR-PATIENT COMMUNICATIONS

A. The Title X Regulations Impose Viewpoint-Based Restrictions on Protected Speech in Violation of the First Amendment

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *United States* v. *Eichman*, 110 S. Ct. 2404, 2410 (1990) (quoting *Texas* v. *Johnson*, 109 S. Ct. 2533, 2544 (1989)). As the Supreme Court has repeatedly emphasized, the First Amendment forbids governmental efforts to suppress "dangerous ideas" by imposing viewpoint-specific speech restrictions.[1] *See Regan* v. *Taxation With Representation*, 461

[1] For example, this Court invalidated a statute prohibiting certain protests near embassies because the restriction "depends entirely upon whether their picket signs are critical of the foreign government or not." *Boos* v. *Barry*, 485 U.S. 312, 318-19 (1988) (O'Connor, J., joined by Stevens, J., and Scalia, J.); *see Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else the

U.S. 540, 548 (1983) (citing *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)). As Justice Stevens stated, "a regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues . . . is the purest example of a 'law . . . abridging the freedom of speech.'" *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring). *Accord City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

The regulations impose glaring and unconstitutional viewpoint restrictions that control not only the communication between health care professionals and their clients in programs partially funded by Title X,[2] but also speech between organizations partially funded by Title X and the public.

1. *The Title X Regulations Discriminate Based on Viewpoint by Requiring Title X Doctors and Counselors To Communicate to Their Patients Prescribed Viewpoint-Specific Information and Prohibiting Them from Discussing Any Contrary Viewpoint*

A review of the Title X regulations at issue here confirms the First Circuit's determination that the regulations constitute a pure example of speech regulation that is "both viewpoint and content-based in violation of the first amendment." *Massachusetts* v. *Secretary of HHS*, 899 F.2d 53, 75 (1st Cir. 1990) (*en banc*).[3] No fair

First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[2] Throughout the brief, employees in family planning programs that receive any Title X funds are referred to as "participating" health care professionals.

[3] In addition to the First Circuit, every other federal court that has reviewed these regulations, except the courts below, has determined that the Title X regulations are viewpoint-discriminatory. *West Virginia Ass'n of Community Health Centers* v. *Sullivan*,

reading could construe these regulations as viewpoint neutral.[4] It is simply impossible to conclude that "the regulations in question do not facially discriminate on the basis of the viewpoint of the speech involved." *New York* v. *Sullivan*, 889 F.2d 401, 414 (2d Cir. 1989). The critical fact is that the Second Circuit majority, over a sharp dissent, found it necessary to mischaracterize the regulations in order to sustain them. The Title X regulations restrict speech not only by compelling participating health care professionals to communicate one viewpoint, but also by prohibiting them from communicating to their clients information that expresses the other viewpoint.

a. *Compelled Speech*

The Title X regulations command and instruct participating health care professionals to inform and refer pregnant clients in the following manner.

First, participating health care professionals are instructed to inform a pregnant client—irrespective of her medical condition, the circumstances of her pregnancy, or her request for information—that abortion is not an "appropriate" response to her medical condition. Indeed, these professionals are instructed to state "that the proj-

—— F. Supp. ——, 1990 Westlaw 66552 (S.D.W. Va. March 1, 1990); *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. 1465, 1475 (D. Colo. 1988).

[4] Contrary to the Respondent's position, this is *not* a situation in which the government has decided simply to fund only preventive family planning services and to avoid any involvement with patients who seek assistance with a pregnancy. Respondent's Brief on Petition for Writ of Certiorari at 5, *New York* v. *Sullivan*, (Nos. 89-1391, 89-1392) (filed May 1990). Title X grantees are *not* instructed simply to inform pregnant clients that the program does not provide information or referrals for pregnant patients, as Respondent suggests. Rather, the regulations specifically direct Title X grantees to undertake to provide counseling and information to women who are pregnant, but to do so in a manner that restricts and distorts the information conveyed to those patients. *See* 42 C.F.R. § 59.8 (1988).

ect can help her to obtain prenatal care" and will provide her with a list of prenatal care providers. 42 C.F.R. § 59.8(b)(5) (1988) (example of acceptable response to inquiry regarding abortion information).

Second, participating doctors and counselors must provide their pregnant clients with "information necessary to protect the health of mother and *unborn child*," *id.* § 59.8(a)(2) (1988) (emphasis added), even if a client has indicated unequivocally her intent to terminate her pregnancy.

Third, participating professionals must give every pregnant client of their facility "a list of available providers that promote the welfare of mother and unborn child." *Id.* These professionals cannot exclude from this list any health care providers that "do not provide abortions." [5] *Id.* § 59.8(a)(3).

Compelled speech, such as these regulations command, plainly violates the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). *See Riley* v. *National Fed'n of Blind*, 487 U.S. 781, 795 (1988); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

b. *Prohibited Speech*

The regulations compound the constitutional infirmity triggered by the forced speech by expressly prohibiting

[5] The participating program must include on the referral list every prenatal health care provider that does not principally provide abortions. *Compare* U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 7.4 (1981) (granting programs discretion to select referral providers).

health professionals from communicating any information that expresses the contrary viewpoint. "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 797 (emphasis in original).

First, a participating professional *cannot refer* a client who seeks to terminate a pregnancy, irrespective of her medical circumstances, to any other health care provider "whose principal business is the provision of abortions." 42 C.F.R. § 59.8(a)(3). Indeed, a participating organization may not even supply pregnant clients with a copy of the Yellow Pages. *See New York* v. *Sullivan*, 889 F.2d at 415 (Cardamone, J., concurring).

Second, participating professionals "may not provide counseling" concerning abortion to any pregnant client. 42 C.F.R. § 59.8(a)(1).

Third, the regulations prohibit participating professionals from "encouraging or promoting abortion," even with respect to pregnancy posing severe medical risks to the patient. 42 C.F.R. § 59.8(a)(3).

These blatantly viewpoint-specific prohibitions flatly contravene this Court's instruction in *Carey* v. *Population Services Internat'l*, 431 U.S. 678, 700 (1977), that the government "may not 'completely suppress the dissemination of concededly truthful information about entirely lawful activity'" (quoting *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976)).

Thus, a straightforward review of the regulations themselves compels the conclusion that, contrary to the premise of the appellate court, the Title X regulations are undeniably viewpoint-restrictive. The majority's statement that "[a]rgumentation pro or con as to the advisability of an abortion for a particular woman is

[6] The regulations except a medical "emergency." 42 C.F.R. § 59.8.

neither required nor authorized," *New York* v. *Sullivan*, 889 F.2d at 414, simply cannot be squared with the regulations as a whole, nor with the regulations' explicit instruction that doctors inform a pregnant woman that "the project does not consider abortion an appropriate method of family planning." 42 C.F.R. § 59.8(b)(5).

2. *The Title X Regulations Prohibit Title X Grantees from Communicating a Particular Viewpoint Through Public Information, Political Expression, and Legal Advocacy*

The constitutional harm of outright censorship of doctor-patient communications is aggravated by the unconstitutional restraints imposed on participating family planning programs. The Title X regulations forbid grantees from expressing a particular viewpoint in the arenas of public information, political expression, and legal advocacy, types of speech that merit stringent First Amendment protection, while leaving expression of opposing viewpoints unrestricted.

First, the regulations prohibit participating organizations from "lobbying for the passage of legislation to increase in any way the availability of abortion." 42 C.F.R. § 59.10(a)(1). Yet, nothing in these regulations forbids Title X grantees from lobbying to *decrease* the availability of abortion.

Second, the regulations prohibit participating organizations from "[p]roviding speakers to promote the use of abortion." 42 C.F.R. § 59.10(a)(2). The regulations do not, however, prohibit Title X grantees from providing speakers who aim to *dissuade* pregnant clients from seeking an abortion.

Third, the regulations prohibit participating organizations from "[p]aying dues to any group that as a significant part of its activities advocates abortion." 42 C.F.R. § 59.10(a)(3). Title X grantees can, however, support groups that *oppose* abortion.

Fourth, the regulations prohibit participating organizations from "disseminating . . . materials . . . advocating abortion." 42 C.F.R. § 59.10(a)(5). Here again, however, Title X grantees can disseminate informational materials aimed at promoting *childbirth*.[7]

Finally, the regulations prohibit participating organizations from "[u]sing legal action to make abortion available in any way." 42 C.F.R. § 59.10(a)(4). Yet, Title X grantees are allowed to participate in legal activities the aim of which is to *minimize* the availability of abortion.

Subpart 59.10 is a blatant attempt to shrink the speech rights of partially Title X-funded organizations. Each of these naked viewpoint restrictions clearly violates the First Amendment prohibition on viewpoint restrictions upon speech. *See Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 505 (1981) (The First Amendment prohibits the suppression of "the dissemination of truthful information about an entirely lawful activity merely because [the government] is fearful of that information's effect upon its disseminators and its recipients."); *see also Martin* v. *Struthers*, 319 U.S. 141, 146-47 (1943). Their combined effect is to gag Title X grantees who wish to express supposedly "dangerous ideas."

Amici are particularly alarmed by the viewpoint-based restriction on partially Title X-funded organizations' right to take legal action. "The right to petition the courts cannot be so handicapped." *Brotherhood of R.R. Trainmen* v. *Virginia State Bar*, 377 U.S. 1, 7 (1964). *See United Transp. Union* v. *Michigan Bar*,

[7] These prohibitions, as interpreted by HHS, would force health care providers with Title X funds from maintaining libraries and written materials with indisputably neutral and accurate information regarding abortion, based on the government view that any information about abortion encourages it. *See* 53 Fed. Reg. 2922, 2923, 2933, 2943 (1988) (final regulations); 52 Fed. Reg. 33,211 (1987) (proposed regulations).

401 U.S. 576, 580-81 (1971); *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). This restriction impedes access to the courts and effective advocacy within the judicial system. Indeed, if the regulations were in effect at this moment, no health care provider receiving any Title X funds would be able to participate in this judicial proceeding.

B. The Title X Regulations Violate the First Amendment by Prohibiting Speech Based on Subject Matter

The Title X regulations are blatant viewpoint-specific restrictions, contrary to the cursory—and erroneous—Second Circuit statements suggesting otherwise. But beyond that, the Title X regulations violate the First Amendment by singling out and proscribing speech on the highly controversial and politicized subject of abortion.

There is no question that prohibitions of speech based on subject matter, like restrictions based on viewpoint, violate the First Amendment guaranty of freedom of speech.[8] For example, in *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49 (1984), this Court admonished that "[r]egulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *See also Police Dep't*

[8] Suppression of speech regarding a particular subject will in some instances constitute viewpoint discrimination. In this case, a Title X patient who learns she is pregnant must choose between one of two inevitable alternatives—continued pregnancy and abortion. In this context, a subject-matter restriction (foreclosure of all abortion-related speech) is equivalent to a viewpoint-based restriction. However labeled, the regulations violate the First Amendment because they silence all speech that expresses the view that abortion is an option—and perhaps a medically advisable option—for a Title X patient. *See Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975) (citing *NAACP* v. *Button*, 371 U.S. at 429 (restrictions on speech are strictly scrutinized regardless of their "particular label")).

v. *Mosley*, 408 U.S. at 95. As the First Circuit stated, "[i]t is by now black letter law that [a subject-matter] restriction is a violation of the first amendment." *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 75.

This Court reiterated its intolerance for subject-matter prohibitions on speech in *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 230 (1987). In that case, the Court struck down a tax scheme based on magazines' subject matter, emphasizing that "the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*." *Id.* at 229 (emphasis in original). *See also Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to [restrictions on speech] extends not only to restrictions on certain viewpoints, but also to prohibition of . . . discussion of an entire topic."); *accord Metromedia, Inc.* v. *San Diego*, 453 U.S. at 515; *Carey* v. *Brown*, 447 U.S. 455, 460-61 (1980).

Thus, even if the Second Circuit were correct in its assertion that the Title X regulations prohibit discussions between participating professionals and patients about the entire topic of abortion, that is a subject-matter speech restriction in violation of the First Amendment.

C. The Title X Regulations Violate the First Amendment by Interfering with Doctor-Patient Communications

The federal courts have consistently reaffirmed that the "right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion." *Poe* v. *Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J.) (dissenting from dismissal). *See Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 73; *Reproductive Health Servs.* v. *Webster*, 851 F.2d 1071, 1078 (8th Cir. 1988), *issue declared moot on appeal*, 109 S. Ct. 3040 (1989); *Planned Parenthood v. Arizona*, 718 F.2d 938, 944 (9th Cir. 1983), 789 F.2d 1348 (9th Cir.) (affirming remand), *aff'd mem.*, 479 U.S. 925 (1986); *see also Bigelow* v. *Virginia*, 421 U.S. at 822 (recognizing First Amendment right to communicate information regarding medical services). This is especially true where, as here, the speech is necessary to effectuate the constitutional right to privacy.[9] *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 73; *see Bigelow* v. *Virginia*, 421 U.S. at 822.

1. *The Regulations Violate the Physician's Right and Duty To Convey Information*

From a professional's perspective, the basic vice of the challenged regulations is that they obstruct a physician's First Amendment freedom, and professional responsibility, to convey essential medical information to a patient. *See Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. at 1477.

Participating doctors are strictly forbidden from counseling patients about abortion, informing a pregnant woman about the availability of abortion, or even telling her where she can receive full abortion-related information. This prohibition applies irrespective of the client's medical condition (*e.g.*, drug addiction, AIDS, diabetes), the circumstances of pregnancy (*e.g.*, rape, incest), or the patient's direct requests for information.

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[9] Although it has been held that the government has a legitimate interest in favoring childbirth over abortion, and that this interest is sufficient to sustain a decision not to provide governmental funding for abortions, *see Harris* v. *McRae*, 448 U.S. 297 (1980) and *Maher* v. *Roe*, 432 U.S. 464 (1977), this Court has never suggested that the government's interest would constitute a compelling interest that would allow the direct abrogation of First Amendment rights. To hold otherwise would be tantamount to declaring childbirth an official state "orthodoxy," which is strictly forbidden by the Constitution. *See Texas* v. *Johnson*, 109 S. Ct. 2533 (1989); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943).

This prohibition against discussing abortion is compounded by 42 C.F.R. subpart 59.8(a)(2), which affirmatively compels a doctor to provide distorted information designed to promote the welfare of "mother" and "unborn child" even when the woman's condition renders this advice contrary to prevailing professional standards. This directly contravenes basic tenets of professional medical ethics and established medical care standards, which require physicians to disclose all medically reasonable available options. *See Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* § 8.07 (1986); N.Y. Public Health Law § 2805-d(1) (McKinney 1985). In fact, a physician who fails to inform a patient of all treatment options and the associated risks may well be liable in tort for malpractice as a result. *See Canterbury* v. *Spence*, 464 F.2d 772, 781-83 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Smith* v. *Cote*, 128 N.H. 231, 513 A.2d 341 (1986).

The coercive combination of prohibition and compulsion creates a dilemma for the doctor: the choice between adherence to the Title X requirements or to the professional codes of ethics, and, correspondingly, between the risks of defunding, on one hand, or disciplinary action, potential tort liability, and, of course, risks to the patient's health or life, on the other.

2. *The Regulations Violate the Patient's Right To Receive Medical Information*

The challenged regulations also affect the patient's rights. This Court has long established that the right to receive information is the essential reciprocal of the right to convey information. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972). This right specifically extends to information on contraception and abortion. *Bigelow* v. *Virginia*, 421 U.S. at 821-22 (1975); *Griswold* v. *Connecticut*, 381 U.S.

at 482 (1965); *see Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. at 1477; *Planned Parenthood* v. *Fitzpatrick*, 401 F. Supp. 554, 577-78 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin* v. *Fitzpatrick*, 428 U.S. 901 (1976).

The right to receive information is especially critical in the context of indigent medical care. *See Virginia Pharmacy Bd.*, 425 U.S. at 763 (suppression of prescription drug price information hits the hardest on the poor, the sick, and the aged). In the particular case of the physician-patient relationship, incomplete and misleading information can be tantamount to fatal misinformation. When the patient is a poor woman, whose only access to health care is a clinic that receives federal funds, her dependence on the accuracy, reliability, and completeness of the medical advice rendered there is total.[10] By preventing full disclosure of crucial information, these regulations thus endanger the health and lives of those who need it most.

Similarly, a paying patient's right to receive medical information is threatened. *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. at 1476; *see* 53 Fed. Reg. at 2931 (comments on final regulations) ("a significant percentage of the clients served by Title X projects are full-pay"). Like indigent women, these patients may turn for medical advice to a partially Title X-funded facility without any knowledge that they will receive a governmentally distorted flow of medical information.

In summary, these regulations directly intrude upon doctor-patient communications for reasons unrelated to —and indeed antithetical to—profesisonal standards and a patient's health interest. The First Amendment will not tolerate such interference with constitutionally protected speech.

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[10] Many Title X-funded clinics provide a unique service for their communities. *See New York* v. *Sullivan*, 899 F.2d at 415 (Cardamone, J., concurring).

II. THE TITLE X REGULATIONS IMPOSE UNCONSTITUTIONAL CONDITIONS ON THE AVAILABILITY OF A GOVERNMENT SUBSIDY

Although the government is under no constitutional obligation to fund or subsidize family planning activities, having done so, it cannot impose conditions that suppress or penalize constitutionally protected expression.[11] The Supreme Court has consistently rejected attempts by the government to condition a subsidy or benefit on the relinquishment by the recipient of a constitutional right:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny . . . the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible.

Perry v. *Sindermann*, 408 U.S. 593, 597 (1972) (citations omitted). *See Sherbert* v. *Verner*, 374 U.S. at 404-05; *Speiser* v. *Randall*, 357 U.S. 513 (1958).

As Justice Scalia has noted, "[i]t is rudimentary that the State cannot exact as the price of [cash subsidies and other] special advantages the forfeiture of First Amendment rights." *Austin* v. *Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1408 (1990) (Scalia, J., dissenting). "It is too late in the day to doubt that the liber-

[11] This prohibition on conditional funding applies whether or not the restrictions are designed specifically to inhibit the exercise of speech rights. *Sherbert* v. *Verner*, 374 U.S. 398, 405 (1963). In this case, the effect of the regulations on speech is direct, explicit, and intentional.

ert[y] of . . . expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U.S. at 404.

Likewise, the government cannot punish an existing recipient of funds for exercising the right to speech. *Perry* v. *Sindermann*, 408 U.S. at 597. Otherwise, the freedom of speech would "be penalized and inhibited," *id.*, which would allow the government indirectly to "produce a result which the State could not command directly." *Speiser* v. *Randall*, 357 U.S. at 526. This method of "interference with constitutional rights is impermissible." *Perry* v. *Sindermann*, 408 U.S. at 597. *See United States* v. *Robel*, 389 U.S. 258 (1967). *See generally* Rosenthal, *Conditional Spending and the Constitution*, 39 Stan. L. Rev. 1103 (1987); Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989).

The Title X regulations cross over the line between a permissible refusal to subsidize constitutionally protected activities and an unconstitutional condition on federal subsidies for two distinct reasons.[12] First, the regula-

[12] Although there is no right to specific types of federally funded health care *services*, *see Harris* v. *McRae*, 448 U.S. 297 (1980) and *Maher* v. *Roe*, 432 U.S. 464 (1977), patients have a right to unimpeded *access to information* from health care providers, even if the medical facility is partially federally funded. *See Webster* v. *Reproductive Health Servs.*, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring) (leaving open for litigation the controversy that would arise if public funds were used to "prohibit publicly employed health professionals from giving specific medical advice to pregnant women"); *id.* at 3053-54 (plurality opinion); *see also Planned Parenthood* v. *Bowen*, 680 F. Supp. at 1475.

Moreover, under *Maher* and *McRae*, the government may fund childbirth provided it "places no governmental obstacle" to the patient's choice, *McRae*, 448 U.S. at 315, and the policy leaves a pregnant woman with the "same choices" as if the government did not provide any medical services, *Webster*, 109 S. Ct. at 3052. *See McRae*, 448 U.S. at 317. Even if they did not offend the First Amendment, the Title X regulations would run afoul of both of these prohibitions by mandating that doctors provide incomplete

tions invidiously discriminate to suppress dangerous ideas. Second, the regulations directly penalize the participating organizations for using independent funds to exercise rights of free speech.

A. The Conditions Placed on the Title X Subsidy Invidiously Discriminate in a Manner Designed To Suppress Dangerous Ideas

The Supreme Court has consistently invalidated allocation of governmental benefits based on the viewpoint or subject matter of the recipient's expression. Congress may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan* v. *Taxation With Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)).[13]

Thus, in *Arkansas Writers' Project*, general-interest magazines were denied tax exemptions available to specialized publications. The Supreme Court found the provision unconstitutional, emphasizing that the "official scrutiny of the content of publications" required by the state was "entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id.* at 229, 230.

While rejecting a content-based rule, the dissent in *Arkansas Writers'* acknowledged that subsidy programs

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and, in many cases, medically misleading information. Instead of no information, or medical advice in her best interest, the pregnant client of a Title X program is provided with the state view on childbirth, under the guise of independent medical judgment.

[13] In *Taxation With Representation*, the Court upheld a requirement that lobbying activities protected by the First Amendment be separated from other activities as a condition of tax deductibility. But the Court emphasized that the tax laws at issue did not discriminate on the basis of content and had neither the intent nor the effect of suppressing ideas. 461 U.S. at 548. The Court cautioned that the outcome "would be different" if the subsidies were discriminatory. *Id.*

can be "manipulated so as to" have a "significant coercive effect" over speech. 481 U.S. at 237 (Scalia, J., dissenting). In those cases "the courts will be available to provide relief." *Id.* The dissent suggested a "prophylactic rule . . . when the subsidy pertains to the expression of a particular *viewpoint* on a matter of political concern." *Id.* (emphasis added).

Similarly, in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), the Court held that Congress could not condition the receipt of grants for public broadcasting with a ban on editorializing. The Court criticized the ban as "defined solely on the basis of the content of the suppressed speech" because "enforcement authorities must necessarily examine the content of the message that is conveyed." *Id.* at 383. Significantly, as here, the government sought to portray the regulation as a mere refusal to subsidize constitutional activity under the spending power, *see id.* at 399, but the Court rejected that approach.

The Title X regulations present this Court with precisely the invidious speech discrimination forewarned in *Regan* v. *Taxation With Representation* and condemned by both the majority and the dissent in *Arkansas Writers'*. Through their funding conditions, the regulations prohibit core protected speech—counseling, referral, pamphlets, lobbying, and legal action—on one side of a controversial social, medical, personal, and political issue, and require speech promoting the other viewpoint.

Likewise, the Title X regulations fail the test set forth in a case upholding the government's refusal to extend food stamp benefits to striking workers. In *Lyng* v. *United Automobile Workers*, 485 U.S. 360 (1988), the Court upheld the statute at issue on the grounds that it "requires no exaction from any individual; it does not 'coerce' belief; and it does not require [strikers] to . . . support political views with which they disagree." 485 U.S. at 369. Additionally, the statute in *Lyng*

fairly reflected the legitimate congressional policy of "maintaining neutrality in private labor disputes." *Id.* at 373.

In contrast, by silencing doctors as to abortion counseling and referral, prescribing the contents of a referral list, prohibiting on a viewpoint-specific basis legal and legislative advocacy, and instructing doctors to tell pregnant clients interested in abortion-related information that abortion is not "appropriate," the Title X regulations, taken as a whole, operate to exact, coerce, and impose state-sponsored political beliefs on Title X programs and their professional employees.

Also unlike *Lyng*, the Title X regulations do not reflect a neutral policy toward the recipients of federal benefits. In *Lyng*, striking workers would not lose existing benefits, but simply would not receive additional benefits. Here, Title X programs lose their Title X funds if they exercise the prohibited speech activity.

Finally, again in contrast to *Lyng*, the Title X regulations impact not only the rights of those receiving the federal subsidy, but also the rights of those who rely on the information. As noted above, many indigent clients are completely dependent on Title X clinics for vital medical knowledge, and will be unaware that the medical information they are receiving has been distorted by the government. In addition, many private paying patients will be unaware that the government has narrowed their medical options, or even that their health care provider receives some of its funds from the federal government.

B. The Title X Regulations Impermissibly Restrict and Penalize Independently Funded Speech

Beyond the fact that viewpoint-based conditions on Title X subsidies are unconstitutional, the regulations violate the First Amendment on separate grounds because they restrict protected speech funded by independent sources. *Massachusetts* v. *Secretary of HHS*, 899 F.2d

at 73-74. As the First Circuit observed, the "Second Circuit . . . ignored the fact that private money ('matching funds') is tied up and held hostage to the same restrictions as Title X funds because of the new definition of the 'Title X program' in the regulations." *Id.* at 71. The government may not use the promise of government funding as a means of, in effect, dictating how the private funds gathered by an organization will be used for protected speech. *FCC* v. *League of Women Voters*, 468 U.S. 364, 399-401 (1984); *see FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986).

Prior decisions in the medical context have consistently applied this principle to strike down laws conditioning government subsidies on termination of privately funded speech activities. *Planned Parenthood* v. *Arizona*, 789 F.2d 1348; *West Virginia Ass'n of Community Health Centers* v. *Sullivan*, —— F. Supp. ——, 1990 Westlaw 66552, at 20 (S.D.W. Va. March 1, 1990); *Valley Family Planning* v. *North Dakota*, 489 F. Supp. 238, 242 (D.N.D. 1980), *aff'd*, 661 F.2d 99 (8th Cir. 1981).

The Title X regulations directly violate this principle. First, the regulations require that the organization devote privately raised funds to Title X projects *and* subject those private funds to the regulations. This guarantees that private funds will be burdened by these regulations. Second, the onerous requirements of separation between a Title X project and an organization's non-funded activities discourage protected speech and unconstitutionally limit private expenditures.

1. *The Regulations' Imposition of Content Restrictions on Non-Federal Funds Unconstitutionally Restricts Independent Spending*

The unconstitutional impact of government regulations on private speech is described in *FCC* v. *League of Women Voters*. There, the Court emphasized that conditioning public broadcasting grants on a ban on editorial-

izing was invalid in part because it prevented local stations from underwriting editorializing with non-federal funds, so that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing . . . and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." 468 U.S. at 400.

That these regulations govern use of private funds is incontrovertible. By definition, the regulations cover all activities of a Title X program regardless of the source of funds: "Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, *grant-related income* or *matching funds.*" 42 C.F.R. § 59.2 (emphasis added).

Two types of private funds are necessarily implicated by this definitional scheme. First, every Title X program includes at least 10% of its budget from matching funds obtained from independent sources. *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 73 n.11. In practice, the independent funds account for between 10 and 91 percent of Title X program funding, with an average of 50%. *Id.* Thus, it follows that, as the First Circuit found, "the regulations directly restrict the use of a significant amount of private money (the 10% or more that the private organizations spend within the Title X program)." *Id.* at 74. *See also West Virginia Ass'n*, 1990 Westlaw 66552, at 19-21 (rejecting view that the Title X regulations restrict only the use of public funds). This First Circuit conclusion is unchallengeable; the Title X program definition demands the inclusion of independent funds.

Second, the regulations affect the organizations' use of privately generated funds from patient fees.[14] Notably,

[14] The regulations define "grant-related income," which includes patient fees, as included in the definition of Title X funds subject to the regulations. 42 C.F.R. § 59.2.

the court below indicated that it was unclear on the record whether participating organizations provide care for private paying patients. *New York* v. *Sullivan*, 889 F.2d at 413-14. However, indisputably, private patients are clients of programs that use Title X funds, as HHS concedes and as two district courts have confirmed. 53 Fed. Reg. at 2931; *see Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. at 1476; *West Virginia Ass'n*, 1990 Westlaw 66552, at 18.

Because of this inclusion of private matching funds and payments from private patients in their coverage, the regulations are invalid as unconsitutional conditions placed on the use of private funds by Title X fund recipients.

2. *The Requirement of Artifically Strict Separation Between Title X Projects and Other Activities Discourages Protected Speech*

Even if the Title X regulations did not mandate the use of independent funds, the regulations would still be unconstitutional due to the burden imposed on the use of private funds by the strict requirements of physical and administrative separation between Title X projects and the participating organizations' independent activities. A series of recent cases outlines the parameters under which the government may attach non-viewpoint-related conditions to government benefits where the conditions have the practical effect of "discourag[ing] protected speech." *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. at 255; *FCC* v. *League of Women Voters*, 468 U.S. 364; *Regan* v. *Taxation With Representation*, 461 U.S. at 545. These cases examine the conditions on the subsidized activities in the light of the organizations' alternative means of exercising the same free speech rights through an affiliate or subsidiary. If "the avenue [that the statute or regulation] leaves open is more burdensome than the one it forecloses," the restriction is unconstitutional. *Massachusetts Citizens for Life*, 479 U.S. at 255.

For example, in *Taxation With Representation*, this Court addressed a regulation that it determined did not discourage protected speech. There, it upheld an IRS requirement that lobbying by tax-exempt organizations must be conducted by a separate "lobbying affiliate." 461 U.S. at 544-45 n.6. Crucial to this holding was the finding that "[t]he IRS apparently requires only that the two groups [the non-profit and its lobbying affiliate] be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." 461 U.S. at 544 n.6. Critically, the tax-exempt organization did not claim that this "dual structure" created *any* discouragement of speech or burden on speech. *Id.*

In contrast, in *FCC* v. *League of Women Voters*, the Court struck down a federal ban on editorializing by noncommercial educational television stations, in part because the ban penalized private, protected speech activity: the stations could not easily segregate speech-related activities by their source of funding. 468 U.S. at 399-401. Applying the *Taxation With Representation* framework, the Court reasoned that if Congress were to allow noncommercial educational stations to establish " 'affiliate' organizations which could then *use the station's facilities* to editorialize with nonfederal funds," then the First Amendment infirmities might be cured. *Id.* at 400 (emphasis added). But absent any such alternative, the restriction on the organization's free speech rights was unconstitutional.

Finally, in *Massachusetts Citizens for Life*, this Court invalidated provisions of federal election law requiring corporations to segregate funds used "in connection with" federal elections.[15] 479 U.S. at 241. The election law mandated changes in accounting and organizational

[15] The law did not apply to unincorporated associations. Thus, the benefits of incorporation were conditioned on the election law requirements.

structure, and imposed other minimal administrative costs. The Court found that the requirement that such activities be segregated in a separate organization unconstitutionally burdened the organization's First Amendment rights.[16] 478 U.S. at 263.

The Title X regulations far exceed the parameters set by this Court in these cases. They require an independently funded activity to be "physically and financially separate" from any of the defined "prohibited activities" and stress that "[m]ere bookkeeping separation of Title X funds from other monies is not sufficient." 42 C.F.R. § 59.9. To be sufficiently physically separate, the Title X facility must, to the government's satisfaction, have separate staff and separate treatment, consultation, examination, and waiting rooms. 42 C.F.R. § 59.10.

The First Circuit found that the separation requirements of the Title X regulations burdened First Amendment speech: "The practical effect of the regulations is to restrict significantly the ability of the recipient organization to engage in the forbidden counseling, even on its own time with its own money." *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 74. Thus, the separation requirements force Title X programs to choose among significantly curtailing activities to achieve the required segregation, closing, and restricting the speech rights of doctors and patients. *Id.* at 75 n.13.

The Title X regulations require a segregation of funded and non-funded activities that is plainly more onerous than the administrative requirements upheld in *Taxation With Representation*, more burdensome than the administrative requirements invalidated in *Massa-*

[16] A plurality in *Massachusetts Citizens for Life* found an impermissible burden in the recordkeeping requirements, disclosure obligations, and solicitation limitations. *Id.* at 256-63. Justice O'Connor found the burden in the organizational restraints placed upon the organization by the state. *Id.* at 265-66 (O'Connor, J., concurring in part and concurring in judgment).

chusetts Citizens for Life, and at least as burdensome as the ban on editorializing invalidated in *League of Women Voters*.[17] They fall clearly on the *League of Women Voters-Massachusetts Citizens for Life* rather than the *Taxation With Representation* side of the line. The speech-impairing requirements of separation of subsidized and non-subsidized activities, far from rendering the restrictions on the subsidized activities constitutional, impermissibly and unconstitutionally penalize the non-subsidized, private activities, chilling protected speech in violation of the First Amendment.[18]

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[17] As the First Circuit specifically found, "this [separation] requirement is significantly more onerous that the purely paperwork requirements at issue in *Regan*." 899 F.2d at 75 n.13. Significantly, the requirement struck down as unconstitutionally burdensome in *League of Women Voters*, like the Title X regulations, would have required stations to operate dual facilities in order to exercise their protected First Amendment rights. 468 U.S. at 399-401.

[18] The vague definitions of separation also burden independent speech. Separation determinations will be made on a "case by case" basis with four "non-exclusive factors" weighed. 53 Fed. Reg. at 2940. No "examples" of combinations of factors that would not be considered "separate" were given because such examples would be "misleading" given the "complex circumstances and conditions that the Department will be considering." *Id.*

When faced with a ban on unreasonable fundraising fees in *Riley*, this Court rejected such case-by-case rules where free speech might be chilled. 487 U.S. at 793-94. "Speakers . . . cannot be made to wait for years before being able to speak with a measure of security." *Id.* at 794. In every case, the fundraiser would "risk . . . a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair." *Id.* "This scheme must necessarily chill speech in direct contravention of the First Amendment dictates." *Id.*

Likewise, Title X grantees' speech with independent funds will be chilled by the poorly defined separation requirement as they are forced to go far beyond the requirements' dictates to avoid defunding.

CONCLUSION

The Title X regulations thus pose a grave challenge to fundamental First Amendment rights and to the central premise that the government cannot invidiously discriminate in its subsidies and cannot condition entitlement to benefits on the relinquishment of the right of free speech. Accordingly, the National Association of Women Lawyers and the National Conference of Women's Bar Associations urge this Court to reverse the decision below and strike down the regulations as unconstitutional.

Respectfully submitted,

JAMES F. FITZPATRICK *
Counsel of Record
L. HOPE O'KEEFFE
LAURENCE J. FREEDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

WALTER DELLINGER
DUKE LAW SCHOOL

Attorneys for Amici Curiae

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